

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE FRANKLIN HERRERA,

Defendant-Appellant.

UNPUBLISHED

November 16, 2001

No. 224030

Ingham Circuit Court

LC No. 99-074448-FH

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II) (sexual contact with victim under the age of thirteen), MCL 750.520c, and was sentenced to concurrent prison terms of 120 to 360 months for each conviction. Defendant appeals as of right. We affirm.

Defendant first argues the trial court improperly excused the prosecution from producing an endorsed witness. To preserve this issue, defendant must have moved for a new trial or have otherwise sought relief based on the issue below. *People v Cooper*, 236 Mich App 643, 655; 601 NW2d 409 (1999), citing *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). A defendant who asserts prejudice because a witness is struck from the witness list must preserve the issue by moving for a new trial. *People v Lawton*, 196 Mich App 341, 356; 492 NW2d 810 (1992). The trial court treated the nonproduction of the witness as a request by the prosecution to delete the witness from the witness list and found there was good cause for the deletion. Although defendant did object to the nonproduction of the witness, he did not move for a new trial, nor did he seek any post-trial hearing to determine prejudice. Thus, this issue has not been preserved for appeal.¹ Further, defendant has not shown that a miscarriage of justice would result from a failure to grant relief based on this unpreserved issue. *Cooper, supra*. The lower court record makes clear that the witness was not a res gestae witness because he was not at the

¹ This case must be distinguished from the case in which the lower court holds a hearing and makes a finding of due diligence for the nonproduction of a witness. Although defendant referenced due diligence before the lower court, the lower court determined the nonproduction of the witness on the basis of good cause. In this particular case, there was no formal hearing to determine prejudice or due diligence.

house at the time of the incident and he came only after the fact. Defendant has offered nothing to show that if this witness had been brought in to testify, his testimony would have changed the outcome of this case.

Defendant next argues the trial court erred by refusing to dismiss the second count of CSC II because the testimony of the victim showed there was only a single act involving touching. We review a trial court's decision on a motion for directed verdict de novo to determine whether the evidence presented, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The victim testified that defendant's lips were on her thighs and his hands were on her vagina and bottom. When the jury asked the lower court to clarify the allegations, the court instructed the jury that Count II involved the genitals and Count III involved the thigh. Reviewing this evidence in the light most favorable to the prosecution, we find that a rational trier of fact could have found the elements were met for two counts of CSC II.²

Defendant next argues the trial court improperly ruled that defendant's prior conviction for breaking and entering could be used to impeach him if he testified at trial. A defendant must testify to preserve the issue of the admissibility of prior convictions. *People v Finley*, 431 Mich 506, 509; 431 NW2d 19 (1988). Because defendant did not testify at trial; this issue is not preserved.³

Defendant's final argument on appeal is that the trial court's sentence was excessive and that the judge did not give an appropriate reason for exceeding the sentencing guidelines. We review a trial court's determination that objective and verifiable factors present constitute substantial and compelling reasons to depart from the statutory minimum sentence for abuse of discretion. *People v Fields*, 448 Mich 58, 77-78; 528 NW2d 176 (1995); *People v Babcock*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000).

The instant offense was committed in January 1999; thus, it is subject to the statutory sentencing guidelines. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). Defendant was convicted of two counts of CSC II, which is a class C felony and subject to a fifteen-year maximum sentence. MCL 750.520c(2); MCL 777.16y. The guidelines placed defendant in the F-I category and provided for a sentence range of twenty-nine to eighty-five months. Pursuant to MCL 769.34(2) and (3), the court may depart from the guidelines if it

² Although not stated in his questions presented, in the body of defendant's brief, defendant argues that trying him for two counts of CSC II based on a single incident violates double jeopardy. Because this issue was not raised at the lower court and was not stated in the questions presented before this Court, we find this issue was not properly preserved or presented. We further find that plain error does not exist to grant defendant relief based on this unpreserved constitutional issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

³ In his brief on appeal, defendant does not argue the merits of the trial court's ruling on this issue. Instead, defendant argues only that the requirement that a defendant be required to testify in order to preserve the issue for appeal is unconstitutional. Defendant did not raise this issue in the questions presented and, therefore, we find this issue is not properly before this Court. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

“has a substantial and compelling reason for that departure and states on the record the reasons for departure.” Pursuant to MCL 769.34(3)(a) and (b), the trial court may depart from the guidelines for nondiscriminatory reasons when there are factors not considered by the guidelines or where the factors considered by the guidelines have been given inadequate or disproportionate weight. *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998).

Defendant claims he received an increased sentence because he was on parole at the time of his sentencing and that this factor was already considered in the guidelines. The record does not support this claim. A close reading of the sentencing transcript shows that the reasons for the trial court’s departure from the guidelines were twofold: first, because defendant had been on parole for *only* fourteen days when he committed the present crime, and second, because defendant *has had previous* parole violations. The trial court did not err in finding that these factors were not adequately considered in the guidelines. We find no abuse of discretion in the trial court’s finding that substantial and compelling reasons existed for departing upward from the guidelines.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey